

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 23, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Riverside Natural Foods Pet Products Inc.*  
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Serial No. 90732664  
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Matthew D. Kendall of Gardner, Linn, Burkhart & Ondersma LLP,  
for Riverside Natural Foods Pet Products Inc.

Jeane Yoo, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

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Before Lykos, Adlin and Cohen,  
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:<sup>1</sup>

Riverside Natural Foods Pet Products Inc. (“Applicant”) seeks to register on the  
Principal Register the stylized mark MADE BETTER, displayed below:

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<sup>1</sup> Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify documents by title and date in .pdf format. References to the briefs and other materials in the appeal record refer to the Board’s TTABVUE docket system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

# made better

for “Pet Food, edible pet treats” in International Class 31.<sup>2</sup>

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the mark PETDINE MADE BETTER and design on the Principal Register displayed below:



for “Pet treats being dietary pet supplements; dietary supplements for pets” in International Class 5,<sup>3</sup> that it is likely to cause confusion or mistake or to deceive.<sup>4</sup>

When the refusal was made final, Applicant appealed. Applicant and the Trademark Examining Attorney have filed briefs.

We affirm the Section 2(d) refusal.

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<sup>2</sup> Application Serial No. 90732664, filed May 25, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) and claiming a priority filing date of May 18, 2021 pursuant to Section 44(d) of the Trademark Act. The application describes the mark as follows: “The mark consists of the word ‘made’ above the word ‘better’ all in small letters.”

<sup>3</sup> Registration No. 6148626 registered September 8, 2020. The registration describes the mark as follows: “The mark consists of the term ‘PETDINE’ with a graphic representation of a curving animal tail wrapping around the letter ‘P’; below the term ‘PETDINE’ appear the words ‘MADE BETTER.’” Color is not claimed as a feature of the mark.

<sup>4</sup> Registration No. 6148626 is also registered for “Private label manufacturing of pet foods, pet treats, pet supplements for others” in International Class 40 which does not form the basis for the Examining Attorney’s refusal.

## **I. Likelihood of Confusion**

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence or argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*4 (Fed. Cir. 2023) (“The Board is required to consider each factor for which it has evidence, but it can focus its analysis on dispositive factors.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); see also *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir.

2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Those factors and others are considered below.

**A. Goods and Services, Channels of Trade and Classes of Consumers**

We begin our analysis by comparing the goods as they are identified in the involved application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also B&B Hardware, Inc. v. Hargis Indus. Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015) (recognizing that an “applicant’s right to register must be made on the basis of the goods described in the application”).

Applicant does not present argument on this factor; rather, Applicant concedes that it “has not previously disputed that the goods are related, and does not do so here.”<sup>5</sup> The goods are more than just related. Indeed, Applicant’s broadly worded identification of “edible pet treats” encompasses, Registrant’s more narrowly identified “pet treats being dietary pet supplements.” *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at \*3-4 (TTAB 2020); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (quoting *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d

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<sup>5</sup> 4 TTABVUE 14.

1007, 1025 (TTAB 2015) (“[w]here the identification of services is broad, the Board ‘presume[s] that the services encompass all services of the type identified”)); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein). Thus, on the face of the respective identifications, the goods are legally identical.<sup>6</sup>

Because the goods are legally identical we presume that the relevant purchasers and channels of trade are also identical. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods ....”) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*17 (TTAB 2023); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

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<sup>6</sup> In addition to the presumption that the goods are legally identical, the Examining Attorney submitted copies of third party webpages including those featuring Greenies, Kirkland Signature, Purina Pro Plan, Blue Buffalo, Earthborn Holistic, Only Natural Pet, and Wellness pet foods or treats and pet dietary supplements, and use-based third-party registrations including for the marks VETDICATE, ARK NATURALS PREOTECTION+, EVERYDAY NATURALS, OLD BONES HAPPY JOINTS, ZESTY PAWS, BRAIN’S BEST FRIEND, PUPPINGTON, STOMAX, and PETS ARE KIDS that are registered for pet foods or treats and pet dietary supplements. February 7, 2022 Office Action at TSDR 9-23; February 24, 2022 Office Action at TSDR 2-33; *see Detroit Athletic Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”).

In view thereof, these *DuPont* factors strongly favor a finding of likelihood of confusion. *See, e.g., Medline Indus., Inc.*, 2020 USPQ2d 10237, at \*4 (TTAB 2020).

### **B. Similarity or Dissimilarity of the Marks**

We now consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Detroit Athletic Co.*, 128 USPQ2d at 1048; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) *accord Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”). Where, as is the case here, the goods are in-part legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe*

*des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). The parties' marks "must be considered ... in light of the fallibility of memory ...." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)).

"No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone." *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)). "On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." *Nat'l Data Corp.*, 224 USPQ at 751. While there is no explicit rule that we must find marks similar where an applicant's mark incorporates the entirety of the registrant's mark, the fact that it does typically increases the similarity between the two. *See, e.g., China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant's mark CHI PLUS is similar to opposer's mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Mem., TN, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is similar to BENGAL for gin); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175

USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL and griffin design for fabrics is similar to WEST POINT for woolen piece goods).

The wording MADE BETTER in Applicant's stylized mark is subsumed in its entirety by the mark in the cited registration. Applicant concedes that the marks "share the common wording MADE BETTER" but argues that "when properly viewed for their overall commercial impressions, are sufficiently different so that there is no likelihood of confusion ... especially when the distinct differences in appearances of the Marks, including the highly dominant PETDINE (stylized) portion ... are given proper weight."<sup>7</sup> In support of its position, Applicant relies heavily on: *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009); *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014); *Steve's Ice Cream, Inc. v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, at \*2 (TTAB 1983); and *Ferro Corp. v. Ronco Labs, Inc.* 356 F.2d 122, 124, 148 USPQ 497, 498-99 (CCPA 1966).

After careful consideration of these cases, we find Applicant's reliance on them misplaced. The consideration of visual and phonetic similarities and differences between marks is a highly fact-specific inquiry. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). In the cases cited by Applicant, the nature of the specific similarities and differences between the marks, the strength of the respective marks (a factor not addressed by Applicant), and the goods involved do not closely parallel those at issue in this case. For example, the unrelated goods and large, prominent design element in *White Rock Distilleries*; the prominent design

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<sup>7</sup> 4 TTABVUE 6.

element with two R's, race flag designs, and hearts in *Covalinski*; the unrelated services and highly stylized design in *Steve's Ice Cream*; and the dominance of the design and weakness of the shared term FERRO in *Ferro Corp.*, were all relevant factors in those cases. None of these factors are present in this case.

*Covalinski*, in particular, is inapposite because in that case the size and placement of the design elements in the applicant's mark diminished the readability of the common term, "racegirl." Here, in contrast, the terms MADE BETTER are minimally stylized and are clear and prominent elements of Registrant's mark and the entirety of Applicant's mark. We disagree with Applicant's argument that the design element of the registered mark is "greatly dominated by the large and stylized term 'PETDINE' in which the letter 'P' is formed in part by a fanciful design of an animal's furry tail."<sup>8</sup> The tail design merely reinforces the word PETDINE in the mark as it is a simple representation of an animal or pet's tail. The design so closely associated with pets would therefore also not identify source, be a consumer's focus, or a way the consumer would be likely to identify or call for the goods.

Further, while we are aware of the jurisprudence that consumers are more likely to focus on the first portion or word in a trademark as argued by Applicant,<sup>9</sup> it is likewise true that likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding or deleting other distinctive matter. If a portion of both marks is the same, then the marks may be confusingly

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<sup>8</sup> 4 TTABVUE 5.

<sup>9</sup> 4 TTABVUE 12-13.

similar notwithstanding some differences. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (similar commercial impression even though applicant's mark PACKARD TECHNOLOGIES, with "TECHNOLOGIES" disclaimed, does not incorporate every feature of opposer's HEWLETT PACKARD marks); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion, noting that the marks are more similar than they are different and that the addition of applicant's "product mark," VANTAGE, to the registered mark would not avoid confusion); *In re The U.S. Shoe Corp.*, 229 USPQ 709 (TTAB 1985) (holding CAREER IMAGE (stylized) for clothing and retail women's clothing store services, and CREST CAREER IMAGES (stylized) for uniforms, likely to cause confusion, noting that CAREER IMAGE would be perceived by consumers as a shortened form of CREST CAREER IMAGES).

In its reply, Applicant attempts to distinguish this case from *The U.S. Shoe Corp.*<sup>10</sup>

Applicant's arguments are unavailing. In *The U.S. Shoe Corp.* the Board wrote:

Applicant's mark consists solely of two thirds of registrant's mark. In registrant's mark, "CREST CAREER IMAGES," the word "CREST" appears in larger letters, alone, above "CAREER IMAGES", which is in different style letters. "CAREER IMAGES" comes across as a single, unified component of the mark and "CREST" as a separate part of the mark, perhaps a house mark. Applicant's mark would appear to prospective purchasers to be a shortened form of registrant's mark. The marks are similar in sound, meaning and appearance because the words in applicant's marks are virtually the same as the words making up one element of registrant's mark.

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<sup>10</sup> 7 TTABVUE 4-5.

229 USPQ at 709. Likewise here, Applicant's mark consists solely of a major component of Registrant's mark with Registrant's mark displaying PETDINE larger and above the differently-styled MADE BETTER. Applicant's argument that PETDINE dominates the registered mark with MADE BETTER in smaller font such that PETDINE "will most likely be impressed in the minds of consumers"<sup>11</sup> is unpersuasive. Applicant's mark does not appropriate PETDINE but because of the shared term MADE BETTER "the marks have similar sounds, appearances and connotations." *Id.* Indeed, "likelihood of confusion often has been found where the entirety of one mark is incorporated within another." *See Double Coin Holdings, Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*6-7 (TTAB 2019) (finding ROAD WARRIOR and WARRIOR (stylized) confusingly similar) (citing *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014)). As asserted by the Examining Attorney, the marks are confusingly similar because "[A]pplicant's mark is likely to appear to prospective purchasers as a shortened form of [R]egistrant's mark."<sup>12</sup> *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (quoting *In re U.S. Shoe Corp.*, 229 USPQ at 709); *Big M. Inc. v. U.S. Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) ("[W]e cannot ignore the propensity of consumers to often shorten trademarks....").

Even though, as Applicant points out, there are differences between the marks in terms of appearance when viewed on a side-by-side basis, we find that in their

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<sup>11</sup> *Id.* at 6.

<sup>12</sup> 6 TTABVUE 4.

entireties, because of the shared identical phrase MADE BETTER, the marks MADE BETTER and PETDINE MADE BETTER are more similar than they are different and, overall, convey very similar commercial impressions.

Moreover, when viewed in connection with pet treats, the meaning of MADE BETTER is the same in both marks, as evidenced by the dictionary definitions submitted by the Examining Attorney.<sup>13</sup> MADE BETTER suggests pet treats that are manufactured or made in a manner that is greater or higher in quality. Applicant does not dispute this meaning.

In view thereof, this *DuPont* factor weighs in favor of finding a likelihood of confusion.

### **C. Conclusion – Balancing the *DuPont* Factors**

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto.<sup>14</sup> It is well-settled that where the goods are identical in part, as is the case here, less similarity between the marks is needed for us to find a likelihood of confusion. *See Coach Servs.*, 101 USPQ2d at 1721. While somewhat different in appearance, overall the marks evoke similar connotations and commercial impressions. The similarities of the marks coupled with the in-part

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<sup>13</sup> February 7, 2022 Office Action at TSDR 5-6. “made” defined as “produced or manufactured” and “better” defined as “greater in excellence or higher in quality.”

<sup>14</sup> Both Applicant and the Examining Attorney have relied on a number of other prior decisions not mentioned in this decision to bolster their positions with regard to a finding, or not, of likelihood of confusion in this case. We have assessed the registrability of Applicant’s mark on its own merits and have carefully considered the arguments and evidence of record in this case, even if not specifically addressed in the decision. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987).

identical goods marketed in the same trade channels to the same classes of consumers lead us to the conclusion that Applicant's mark for "edible pet treats" is likely to be confused with Registrant's mark for "pet treats being dietary pet supplements."

**Decision:** The Section 2(d) refusal is affirmed.